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No. 88-1810

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WALTER W. STEFFEN,
Petitioner,
v.
MERIDIAN LIFE INSURANCE COMPANY AND
MERIDIAN MUTUAL INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when determining if a civil action is within the scope of an administrative charge under the Age Discrimination in Employment Act ("ADEA"), courts employ a uniform standard that comports with statutory procedural requirements without creating unnecessary procedural barriers for employees who believe their employers have discriminated against them.

2. Whether the court below correctly applied the uniform standard to the particular facts of this case.

LIST OF PARTIES

Respondents Meridian Life Insurance Company and Meridian Mutual Insurance Company were defendants-appellees below, urging affirmance of the district court's judgment. Pursuant to Rule 28.1, Respondents state the following:

(1) Meridian Life Insurance Company, which is a wholly-owned subsidiary of Meridian Mutual Insurance Company, has no non-wholly owned subsidiary or affiliate corporation; and

(2) Meridian Mutual Insurance Company has no parent corporation or affiliate corporation. It has one non-wholly owned subsidiary, Meridian Insurance Group, Inc.

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BRIEF IN OPPOSITION

Respondents, Meridian Life Insurance Company and Meridian Mutual Insurance Company (collectively "Meridian"), defendants-appellees in the proceedings below, urge this Court to deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered October 11, 1988.

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISIONS

Meridian accepts the statement as to opinions below, jurisdiction, and statutory provisions involved as stated by the Petitioner, Walter W. Steffen ("Steffen"), plaintiff-appellant in the proceedings below.

STATEMENT OF THE CASE

I. Background

On March 31, 1983, Steffen's duties with Meridian were realigned. (Pet. App. F, pp. 86a-87a.) Subsequently, in early May 1983, Steffen retained an attorney who advised him of his rights and remedies under the ADEA. (Pet. App. F, pp. 89a, 99a.)

On May 13, 1983, after consulting with his attorney, Steffen completed an Intake Questionnaire at the Equal Employment Opportunity Commission ("EEOC") in which he alleged that he had been demoted because of his age and specifically noted that he was represented by an attorney.[1] (Pet. App. G, pp. 102a-103a, 105a.) That attorney continued to represent Steffen until the attorney's death on or about July 1, 1984. (Pet. App. F, pp. 89a-90a.)

After an internal auditor's investigation of Steffen's performing work for another life insurance company, a potential violation of Meridian's written conflict of interest policy, and a review of the auditor's report by the Joint Audit Committee of Meridian's Board of Directors, the Committee found that Steffen had violated Meridian's conflict of interest policy and recommended that the Board of Directors take appropriate disciplinary action. The Board then unanimously resolved to accept Steffen's resignation, if offered, or, alternatively, to terminate his employment relationship with Meridian. (*See generally* Pet. App. A, pp. 12a-26a.) Steffen's employment was terminated on November 18, 1983. (Pet. App. H, p. 108a.)

On December 1, 1983, Steffen filed a second EEOC charge in which he alleged he was discharged because of

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[1] The Seventh Circuit held that, under the circumstances as alleged by Steffen, this Intake Questionnaire satisfied the statutory charge-filing requirement. (Pet. App. A, p. 40a).

his age and precisely detailed the facts he believed supported his allegations. (Pet. App. H, pp. 108a-111a.) The charge did not allege retaliation or refer to any facts to indicate a nexus between his discharge and his prior participation in the administrative process or his opposition to Meridian's alleged discriminatory practices. Moreover, the EEOC, which was not alerted to any claim of retaliatory conduct, did not investigate or attempt conciliation of any alleged retaliatory conduct. (Record on Appeal, Doc. 05, attached Ex. 2, pp. 38-39; Doc. 08, attached Ex. 1, p. 115.)

II. Proceedings Below

On December 27, 1984, more than one year after filing his charge of discriminatory discharge, Steffen filed his judicial complaint wherein for the first time he claimed that he was discharged in retaliation for exerting his rights under the ADEA.

On October 15, 1985, Meridian moved for summary judgment on the retaliatory discharge claim based on Steffen's failure to exhaust his administrative remedies by filing with the EEOC a charge of retaliatory discharge in accordance with the requirements of 29 U.S.C. § 626(d). (Pet. App. D, pp. 70a, 75a.) The district court entered judgment for the defendants on that claim. (Pet. App. D, p. 81a.) The district court distinguished Steffen's case from cases in which courts permit plaintiffs to seek relief for acts of retaliation which are not listed in an initial charge filed before the alleged retaliatory conduct occurred. (Pet. App. D, pp. 78a-81a.) The district court emphasized that Steffen's alleged retaliatory discharge occurred before he filed his second EEOC charge: "If Steffen intended to pursue the retaliatory discharge claim in this court, he must have included it in his EEOC charge which was filed *after* the allegedly continuing discriminatory conduct occurred." (Pet. App. D, p. 81a (emphasis added).)

The Seventh Circuit affirmed the district court: "[T]he district court properly entered summary judgment in Meridian's behalf on Steffen's retaliatory discharge claim." (Pet. App. A, p. 52a.) The Court of Appeals, too, focused on the specific facts of this case and distinguished it from cases in which courts "have allowed a retaliatory discharge claim to proceed even though the underlying charge did not mention retaliation." (Pet. App. A, p. 51a n.2.) Those cases, the court observed,

> all involved situations where the alleged retaliation arose *after* the charge of discrimination had been filed or the employer was given clear notice from the EEOC that retaliation was at issue; thus, "a double filing . . . would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII."

(Pet. App. A, p. 52a n.2 (original emphasis).) The court continued, "These cases are distinguishable from the present case where the alleged retaliatory acts occurred *before* Steffen's December 1, 1983 charge of discrimination was filed and Meridian was not given clear notice that retaliation was an issue." (*Id.* (original emphasis).)

No judge in active service requested a vote on Steffen's Petition for Rehearing and Suggestion for Rehearing *In Banc*, and all of the judges on the original panel voted to deny rehearing. (Pet. App. C, pp. 68a-69a.) The court entered an order denying Steffen's Petition for Rehearing on January 18, 1989. (*Id.*)

SUMMARY OF ARGUMENT

Steffen's stated reasons for his Petition are insufficient to warrant review of the Seventh Circuit's decision. Steffen does not allege that the Seventh Circuit has decided a federal question in a way that conflicts with an applicable decision of this Court, nor does he allege that the Seventh Circuit's decision conflicts with the decision of another federal court of appeals or any other lower

court. Instead, through innuendo, Steffen attempts to create conflict. The arguments supporting his Petition are legally erroneous and suggest that his real complaint is nothing more than his dissatisfaction with the district court's and Court of Appeals' application of well-established legal principles to the particular facts of his case.

Steffen first contends that there is not a uniform test for determining whether allegations of a judicial complaint are within the scope of the EEOC charge. That contention ignores nineteen years of decisions in which courts consistently have relied upon a uniform standard in determining the scope of a subsequent civil action. A review of any of the scores of cases involving "scope" issues demonstrates that courts simply refer to alternate descriptions of the same test and that the underlying rationale and analysis are, indeed, identical. It is dissimilar *facts* that yield dissimilar results in these cases, not the lack of a uniform test. Consequently, Steffen's implication of conflict is meritless.

Second, Steffen implicitly argues that the court below improperly concluded that retaliation was not within the scope of his charge and claims that the court established "precedent for the proposition that a second charge specifically alleging retaliation is required to assert a claim for retaliation in a civil action." Those assertions are equally groundless. The court's decision does not require the filing of a second charge or the inclusion of a specific allegation of retaliation in each case. The court's determination that Steffen's judicial allegation of retaliation was outside the scope of his EEOC charge was based on the particular facts of this case where a second charge had been filed. The court fully considered those facts and correctly decided that Steffen's claim of retaliatory discharge was not within the scope of his EEOC charge, which was filed after the allegedly discriminatory discharge occurred.

Steffen's reasons for granting his Petition are nothing more than personal complaints as to the court's view of the facts and the application of well-established legal principles to those facts. His complaints are not sufficient to merit this Court's review.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Lower Courts' "Scope Of The Charge" Test Is A Uniform Standard That Recognizes Statutory Procedural Requirements And Protects The Rights Of Laymen Initiating The Administrative Process

The scope of the charge standard that is applied by lower courts generally and by the district court and Court of Appeals in this matter is a uniform standard that takes into account this Court's caution to interpret liberally civil rights statutes so as to protect the rights of employees who may be the victims of unlawful employment discrimination. This Court has admonished courts to avoid creating additional procedural technicalities when interpreting civil rights statutes in which the administrative process is often initiated by "laymen, unassisted by trained lawyers." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397, *reh'g denied*, 456 U.S. 940 (1982) (cases involving timely charge issues). However, this Court has also advised that "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law," *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980), and that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, *reh'g denied*, 467 U.S. 1231 (1984).

Under the ADEA, one such procedural requirement is "[n]o civil action may be commenced by an individual . . . until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. § 626(d) (1982). Thus, a plaintiff is required to file a charge that encompasses the acts complained of as a prerequisite to filing a suit in federal court. The policy behind this requirement, which is similar to the timeliness requirement, is to (1) allow the agency an opportunity to investigate and conciliate the claims of discrimination and (2) give the employer timely notice of claims and promote the employer's good faith negotiations during conciliation. *Babrocky v. Jewel Food Co. and Retail Meatcutters Union*, 773 F.2d 857, 863 (7th Cir. 1985).

To accommodate the concern for "laymen" who are "'unassisted by trained lawyers," courts, including the Seventh Circuit, consistently have relaxed the requirement that a plaintiff include in his charge all alleged conduct. They have, instead, extended the scope of the complaint to include discriminatory matters that are like or reasonably related to the charge and grow out of such allegations or which can reasonably be expected to grow out of an investigation of the charge as well as matters actually investigated by the EEOC. *See, e.g., Babrocky*, 773 F.2d at 864; *Jenkins v. Blue Cross Mutual Hospital Ins., Inc.*, 538 F.2d 164, 167-68 (7th Cir.), *cert. denied*, 429 U.S. 986 (1976); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).[2]

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[2] "The Seventh Circuit has indicated that the 'like or related' test is to be very liberally applied" and "has read the relatedness requirement very broadly . . . ." *McCray v. Standard Oil*, 76 F.R.D. 490, 497-98 (N.D. Ill. 1977) (*citing Jenkins* and *Sanchez*). The court's rule "seeks to insure that the EEOC's voluntary conciliation procedures will be invoked before a federal suit is filed" and "allows the scope of the judicial complaint to extend the scope of the EEOC investigation growing out of the charges." *Id.* at 497.

Virtually every circuit has employed a scope of the charge standard that avoids a requirement that a plaintiff file a charge spe-

Applying this uniform approach, courts first look to the actual investigation triggered by the EEOC charge to determine if the EEOC investigated an instance of alleged discrimination. In the absence of an actual investigation of a type of discrimination alleged in the judicial complaint, courts look to the facts alleged in the EEOC charge to determine if the facts describe the discrimination about which the employee complains in court. *See Smith v. Sentry Ins.*, 674 F.Supp. 1459, 1467-68 (N.D. Ga. 1987).

Steffen is unable to identify any manner in which the Seventh Circuit's application of this standard conflicts with applicable decisions of this Court. Without support, he asserts that the lower court's application of its scope of the charge test to the facts of this case undermines prior principles established by this Court.[3] His assertion is erroneous. Steffen fails to cite, and Meridian's research has not revealed, a single decision in which this Court has addressed the scope of the charge issue. Steffen baldly asserts that the Seventh Circuit's decision undermines the guiding principles announced in *Love*, 404 U.S. 522, and *Zipes*, 455 U.S. 385. That claim, however, is simply without merit. In reality, the Seventh Circuit's formulation is wholly consistent with the policy considerations announced in *Love* and *Zipes*. *See, e.g.*, Seventh Circuit decisions, *Babrocky*, 773 F.2d at 863-64, and *Jenkins*, 538 F.2d at 167-68, citing *Love* and *Zipes*.

Next, Steffen repeatedly intimates that there is a conflict among the courts regarding the test for determining whether a plaintiff's judicial complaint is within the

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cifically and carefully articulating the employer's alleged discriminatory conduct. *Babrocky*, 773 F.2d at 864.

[3] Without discussion, Steffen also announces that the Seventh Circuit's decision undermines congressional policies, which policies he fails to identify. (Pet., p. 11.)

scope of his EEOC charge.[4] There is, however, no confusion or lack of uniformity in the tests applied by the courts. Even a cursory reading of the myriad of "scope" cases reveals that, notwithstanding which articulated form of the test (or combination of forms) is used, courts focus on the same policy considerations and look to the words of the charge and the EEOC's investigation.[5]

In *Sanchez*, the Fifth Circuit first announced the scope of the judicial complaint standard that has become the model for other courts. Responding to the question what standard should be used in measuring the proper scope of a judicial complaint, the court adopted the answer of one of its district courts: a judicial complaint "'may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegation during the pendency of the case before the Commission.'" *Sanchez*, 431 F.2d at 466 (*quoting King v. Georgia Power Co.*, 295 F.Supp. 943, 947 (N.D. Ga. 1968)). Then the court added, "*In other words*, the 'scope' of the judicial complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Id.* at 466 (emphasis added). Thus, from the genesis of the "scope" test, the court articulated alternate characterizations of the *same* test.

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[4] By failing to state that there is a conflict between the Seventh Circuit's decision and any other decision of a federal court of appeals, or any other lower court, Steffen implicitly acknowledges that a conflict regarding the "scope" test does not exist.

[5] Although Steffen asserts that "[a] review of recent federal court decisions illustrates few courts apply these different tests in a way which achieve[s] similar results," Steffen does not give a single example of confusing or non-uniform decisions that resulted from courts' application of the different characterizations of the scope of the charge test. (Pet., pp. 20-21.) The "ever-worsening 'scope of [the] charge' dilemma" to which Steffen urges this Court to turn its attention (Pet., p. 26) is imaginary. This manufactured dilemma is not substantiated by Steffen's Petition or by case law. The circuits are in accord on this issue. *Babrocky*, 773 F.2d at 864.

Subsequently, courts, including the Seventh Circuit, have interchanged the language used to describe the standard, but the policy considerations and the analyses have remained constant. *See, e.g.*, the following characterizations that have emanated from the Seventh Circuit: *Babrocky*, 773 F.2d at 864 ("All claims of discrimination are cognizable that are 'like or reasonably related to the allegations of the charge and growing out of such allegations.'"); *Hemmige v. Chicago Public Schools*, 786 F.2d 280, 283 (7th Cir. 1986) ("[T]he trial court recognized that the scope of the judicial complaint is not limited to the precise facts set out in the EEOC charge—but rather 'to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.'"); *Grimes v. Louisville and Nashville Railroad Co.*, 583 F.Supp. 642, 649 (S.D. Ind. 1984), *aff'd without opinion*, 767 F.2d 925 (7th Cir. 1985), *cert. denied*, 476 U.S. 1160, *reh'g denied*, 478 U.S. 1031 (1986) ("[T]he Court may exercise jurisdiction over like or related matters which might reasonably be expected to be subject to EEOC investigation growing out of the charge."). There is, however, no discord or confusion in the application of these various characterizations of the test. In fact, the *Babrocky* court emphasized that the circuits were "in accord with [the] analysis" of judicial complaints.[6] 773 F.2d at 864.

Steffen relies on *Reiter v. Center Consolidated School District No. 26-JT*, 618 F.Supp. 1458 (D. Colo. 1985), to bolster his argument that the tests for determining the scope of the charge are confusing and that there is a need for uniformity that must be addressed by this Court.

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[6] The court cited decisions from the Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits including the Fifth Circuit's seminal *Sanchez* decision. Moreover, in stating its scope test, the court quoted *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971), *cert. denied*, 429 U.S. 986 (1976), a Fifth Circuit decision decided the year after *Sanchez*.

(Pet., pp. 19-20.) However, Judge Kane does not indicate that there is any confusion caused by the "various formulations." In fact, Judge Kane recognizes that

> [r]egardless of what formulation is employed, "the most important considerations are whether the defendant had sufficient notice from the administrative charge of the alleged kinds and areas of discrimination and whether the administrative agencies and employers involved had an opportunity to work on a conciliation agreement for voluntary compliance in the challenged areas."

Reiter, 618 F.Supp. at 1461 (citations omitted).

In determining whether Steffen's judicial complaint was within the scope of his EEOC charge, the Seventh Circuit relied on precisely the same standard as other courts, employed the same considerations recognized by Judge Kane, and correctly concluded, as did the district court, that, under the circumstances in this case, Steffen was barred from maintaining a retaliatory discharge action.

II. The Court Below Correctly Applied Well-Established Legal Principles To The Facts

A. The Court Below Properly Concluded That Retaliation Was Not Within The Scope Of Steffen's EEOC Charge

Steffen decries the "tragic consequence[s]" that befall American workers whose significant statutory rights are jeopardized when they rely on "non-attorneys" to "advise them regarding their rights." (Pet., pp. 11-13.) He urges this Court's intervention on behalf of those "victims of various forms of job discrimination" who are penalized by a "technical deficiency" in their administrative charges because workers are "often unable to fully articulate [their] grievances." (Pet. pp. 12-13.)

Significantly, however, these concerns for the prototype worker for whom courts have demonstrated some willing-

ness to relax procedural requirements are not present here. Steffen is not a proper petitioner to invoke indulgence and liberality for the unschooled, inarticulate layman, unfamiliar with administrative procedures and the law. *See Jiron v. Sperry Rand Corp.*, 423 F.Supp. 155, 160 (D. Utah 1975). Steffen did not lose his day in court because of a "technical error" in his EEOC charge. *Cf. Sanchez*, 431 F.2d 455 (where the plaintiff failed to check the appropriate box on her original charge of discrimination).

Steffen, a high-level executive, retained and consulted an attorney within four weeks after he believed Meridian initially discriminated against him. (Pet. App. F, pp. 86a, 89a.) His attorney advised him of his rights and remedies under the ADEA. (Pet. App. F, pp. 89a-90a, 99a.) Steffen, subsequently, visited the EEOC to complain about his allegedly discriminatory demotion and completed an Intake Questionnaire on May 13, 1983, specifically stating he was represented by an attorney. (Pet. App. F, pp. 90a-92a; Pet. App. G, p. 105a.) The attorney continued to represent Steffen in attempts to resolve the dispute about Steffen's change of duties and responsibilities. (Pet. App. F, pp. 89a-90a, 94a-100a.) After Steffen was discharged in November 1983, he filed a second charge on December 1, 1983, alleging that he had been terminated because of his age. (Pet. App. H, pp. 106a-111a.) [7]

More than one year later, on December 27, 1984, when Steffen filed his judicial complaint, for the first time he alleged that his discharge was retaliatory. In response to Meridian's Motion for Partial Summary Judgment, the court reviewed the factual allegations of Steffen's EEOC charge to determine whether his retaliation claims

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[7] Steffen's attorney died on or about July 1, 1984, more than seven months after Steffen filed his second EEOC charge. (Pet. App. F, p. 89a.) He subsequently retained new counsel.

were within the charge's scope. His charge does not refer to his previous charge of age discrimination or to his attorney's prior attempts to resolve his claim of discriminatory demotion. (Pet. App. H, pp. 108a-110a.) His allegations that he was terminated, demoted and denied profit sharing benefits were grounded only on his belief that *age* affected the decisions.[8] Absent some reference in the charge to the fact that Steffen had previously complained of discrimination, it is impossible for anyone—a layman, an EEOC officer or an employment lawyer—to infer that Steffen's discharge was the result of his earlier opposing Meridian's decisions or exercising his statutory rights.[9] *Cf. Jenkins*, 538 F.2d at 168-69 (where the factual statements raised claims of both sex and race discrimination).

Moreover, the evidence shows that nothing outside the charge alerted the EEOC investigator, who would have

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[8] The court noted that Steffen had checked the box marked "other," "specifically" had written in "age," and had made "no mention of retaliation or any other words to that effect." (Pet. App. A, pp. 48a-49a).

[9] Before the Court of Appeals, it was argued that Steffen's assertion that the reason for his termination was "pretext" raises the issue of retaliation. The court below concluded, "This contention misses the mark by a wide margin." (Pet. App. A, p. 49a.) Steffen's "pretext" language is directly related to Steffen's statement that he was the "oldest employee" at Meridian. While it alerts the EEOC to Steffen's belief that Meridian's stated reason for his termination was a pretext for age discrimination, it "cannot reasonably be expected to alert the [EEOC] to the separate and distinct charge of retaliation." *Meyer v. Macmillan Publishing Co.*, 85 F.R.D. 149, 152 (S.D.N.Y. 1980); *see also Ekanem v. Health and Hospital Corp.*, 724 F.2d 563, 573 (7th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984) (original emphasis) ("A charge that a given wage is too low because of unlawful *retaliation* is not the same as a charge that a given wage is too low because of unlawful *race discrimination*."); *Tucker v. Harley Davidson Motor Co.*, 454 F.Supp. 738, 742 (E.D. Wis. 1978) (holding that an allegation of discriminatory dismissal does not fairly encompass the allegations of retaliatory discharge).

had access to the file from Steffen's first charge, to a claim of retaliation. The EEOC's Log of Investigative Settlement Actions shows that after the investigator talked with Steffen and Meridian's counsel about the case, he continued his investigation by preparing and forwarding to Meridian a "Request for Information." (Record on Appeal, Doc. 08, attached Ex. 1, p. 115.) That Request, which included fourteen inquiries, did not seek any information about the informal conciliation, Steffen's prior representation by counsel or Steffen's complaints about his demotion. (Record on Appeal, Doc. 05, attached Ex. 2, pp. 38-39.) Because the EEOC did not have notice of a retaliation claim, Meridian did not have notice and was not given an opportunity to conciliate a retaliation charge. *See Jensen v. Board of County Commissioners for Sedgwick County*, 636 F.Supp. 293, 300 (D. Kan. 1986) (Where the plaintiff, like Steffen, filed a charge of discriminatory discharge but did not allege retaliation, the court held that the retaliation claim "is separate and distinct from a discrimination claim, and even under a liberal analysis, it is not 'reasonably related to the charges alleged.'").

It is upon these facts that the court correctly concluded that Steffen's claim of retaliatory discharge was not within the scope of his charge.

Steffen's failure to include the facts supporting a claim of retaliation in his charge is inexcusable. As the Seventh Circuit concluded, at the time he filed his December 1, 1983 charge, all the facts on which he based his civil action were known, but he did not allege retaliation or allege facts from which retaliation could reasonably be inferred. The district court emphasized the same fact when it distinguished Steffen's case from cases in which retaliatory conduct occurred after, rather than before, the filing of a charge. (Pet. App. D, pp. 78a-81a.)

Relying upon *Smith v. Sentry Ins.*, 674 F. Supp. 1459 (N.D. Ga. 1987), Steffen suggests that an EEOC in-

vestigator would have unavoidably concluded that his discharge might be in retaliation for the assertion of his ADEA rights. (Pet., p. 18.) That suggestion is without merit. First, in this case the investigator did not reach such an unavoidable conclusion because the investigator did not investigate or attempt to conciliate a claim of retaliatory discharge. (Record on Appeal, Doc. 05, attached Ex. 2, pp. 38-39 (EEOC's Request for Information); Doc. 08, attached Ex. 1, p. 115 (EEOC Log of Investigative Settlement Actions).) Second, Smith's case is distinguishable from Steffen's.

In *Smith*, the court held that the plaintiff's claim of retaliatory discharge was encompassed in his EEOC charge and in the investigation reasonably growing out of that charge. There was no evidence of the actual EEOC investigation in the record, so the court turned to the charge itself. Although the charge did not describe Smith's termination in terms of retaliatory discharge, Smith stated in his Intake Questionnaire that the discriminatory actions against him were the result of "*retaliatory* appraisal," "discrimination [sic] promotion" and "discriminatory/*retaliatory* termination and possibly other actions." *Smith*, 674 F. Supp. at 1464 (emphasis added). Thus, unlike Steffen, Smith alerted the EEOC that he believed his termination was the result of his prior opposition to what he believed were his employer's unlawful employment practices. *See also Johnson v. General Electric*, 840 F.2d 132, 139 (1st Cir. 1988) (holding that a retaliation claim "could not have been expected to be part of the scope of the EEOC's investigation growing out of appellant's earlier complaints, because plaintiff has not alleged that he even informed the EEOC of the alleged retaliation"); *Meyer v. Macmillan Publishing Co.*, 85 F.R.D. at 151 ("For the EEOC reasonably to be expected to investigate the retaliation charge, that agency should have been alerted to the claim."). Here, the EEOC was not alerted to a claim of retaliatory dis-

charge because Steffen did not so much as hint that he believed his discharge was based on retaliatory motive.[10]

A court should not require "an exact correspondence between the words of the EEOC charge and the judicial complaint." *Babrocky*, 773 F.2d at 865-66.[11] However, here, Steffen filed his charge *after* the alleged retaliation occurred; there is no correspondence between the two; and there was no investigation of retaliation. Thus, the Seventh Circuit correctly held that Steffen could not "inject[] an entirely new theory of liability into the case alleging unlawful activity of a much different nature than the age discrimination alleged in the charge." (Pet. App. A, p. 50a.) A contrary ruling would emasculate the dual purposes of putting the employer on notice of the allegations and of allowing the agency to attempt an informal conciliation of the charges.[12] *See Jiron*, 423 F.Supp. at 159.

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[10] Steffen concludes his Petition pleading, "How could [I], [my] EEOC counselor or anyone have identified whether [my] termination by Meridian was more age discrimination or in retaliation for the assertion of [my] ADEA rights?". (Pet., p. 26.) That rhetorical question is best answered by a review of Steffen's charge which demonstrates that Steffen could and, in fact, did specifically identify that he believed he was discharged *only* because of his age. After stating, "I feel that I have been discriminated against because of my age," Steffen added, "At the time of my termination I was the oldest employee in the Company." (Pet. App. H, pp. 109a-110a.) Retaliation did not become an alleged motive until more than one year later after a second counsel, who prepared the judicial complaint, became involved.

[11] *See also Sanchez*, 431 F.2d at 465 ("[T]he specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow.").

[12] Steffen argued in the court below that nothing different would have occurred during the conciliation if retaliation had been specifically alleged. That argument is unsound. An employer charged with discrimination *and* retaliation is in a totally different conciliation posture than one charged solely with discriminatory conduct. *Cf. EEOC v. St. Anne's Hospital of Chicago*, 664 F.2d 128, 131

B. The Decision Of The Court Below Does Not Require The Filing Of A Second Charge That Specifically Alleges Retaliation

Finally, Steffen complains that the lower court's decision will require a worker who files an administrative charge and, subsequently, suffers adverse employment actions to file a second charge "specifically articulating the possibility" that the subsequent actions were retaliatory in nature in order to bring a civil action based on retaliation. (Pet., p. 25; *see also* pp. 11-13, 23.) No fair reading of the court's decision supports Steffen's contention. Even Steffen acknowledges that "[t]he language of the decision rejects this additional charge requirement," yet he insists that the "holding establishes legal precedent for such a requirement." (Pet., p. 23.) The court's holding that retaliation is not within the scope of the charge clearly was based on the specific facts of this case in which a second charge had been filed. Moreover, here, the alleged retaliation occurred prior to Steffen's filing his second charge of discrimination, which charge referred only to age discrimination as a basis for his discharge and did not suggest in any fashion that his discharge was motivated by retaliation.

It is true that courts frequently permit plaintiffs to seek relief for acts of retaliation even if they are not listed in an initial charge when the act of retaliation occurs after the EEOC charge was being considered and the employee does not file a second charge. *See Ross v. Kansas Commission on Civil Rights*, 45 Fair Empl. Prac. Cas. 1472, 1475 (D. Kan. 1982). Courts reason that requiring a plaintiff to file a second charge would "place a needless procedural barrier against claimants under Title VII and that eliminating such a barrier will dis-

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(7th Cir. 1981) (where the court rejected the defendant's claim that it was denied an opportunity to conciliate because the defendant, unlike Meridian, had been "informed prior to the reasonable cause determination that retaliatory discharge had become the issue").

courage employers from attempting to deter employees from exercising their Title VII rights." *Id.* at 1475; *see also Gupta v. East Texas State University*, 654 F.2d 411, 414 (5th Cir. 1981) ("[I]t is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge" because "a double filing . . . would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII."); *EEOC v. Reichhold Chemicals*, 700 F.Supp. 524, 527 (N.D. Fla. 1988) (extending the *Gupta* rationale to a case in which the EEOC was the plaintiff); *Grimes*, 583 F.Supp. at 649. As previously discussed, both the district court and the Court of Appeals emphasized that Steffen, who filed his charge *after* the alleged retaliation occurred, did not face such a procedural "barrier" or "technicality." (Pet. App. A, pp. 51a-52a n.2; Pet. App. D, pp. 78a-81a.) Steffen filed a second charge *after* the alleged retaliation, yet his detailed charge is devoid of any facts from which to infer he believed that retaliatory motive was the basis of his discharge.

Steffen is certainly not a charging party "so unlettered and inarticulate that he does not fully comprehend the distinction between an act motivated by [age discrimination] and an identical act motivated by [retaliation]." *Sanchez*, 431 F.2d at 462-63. It is, therefore, fair to conclude that Steffen believed his discharge was solely based on age. It is also fair to conclude that retaliatory motive was an afterthought that sprang forth when Steffen obtained new counsel after the death of his initial counsel in July 1984.

Here, the procedural requirements for gaining access to the federal courts should not be disregarded. Steffen's case does not warrant further relaxation of the statutory procedural requirements.

III. This Case Does Not Merit The Court's Review

Steffen has not presented reasons of the character that warrant granting a Petition for a Writ of Certiorari. Steffen has not cited a single applicable decision of this Court with which the Seventh Circuit's decision conflicts. Steffen has failed to establish the existence of a conflict among the circuits with regard to the standard for determining whether a civil action based on retaliation is within the scope of an EEOC charge. He simply has presented to this Court a single plaintiff who is dissatisfied with the court's application of well-established legal principles to the particular facts of his case. Steffen's dissatisfaction is not a cert-worthy issue, and his case does not merit this Court's review.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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